

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.913 OF 2001

Babar Mohan Dubala,
residing at Post: Vangaon
Kompada, Tal. Dahanu,
District: Thane.

.... Appellant
(Ori.Accused No.1)

- Versus -

The State of Maharashtra
(at the instance of Vangaon
police station, Tal. Dahanu,
Dist: Thane)

.... Respondent

AND

CRIMINAL APPEAL NO.480 OF 2002

1. Aalu Narayan Dubala

2. Besti Babar Dubla

Both residing at Post: Vangaon
Kompada, Tal. Dahanu,
District: Thane.

.... Appellants
(Ori.Accused Nos.2 & 3)

- Versus -

The State of Maharashtra
(at the instance of Vangaon
police station, Tal. Dahanu,
Dist: Thane)

.... Respondent

Shri Nitin V. Gangal, Advocate for the Appellant/s
in both the Appeals.

Shri A.M. Shringarpure, Addl. Public Prosecutor
for the Respondent-State in both the Appeals.

CORAM: N.V. DABHOLKAR &
Smt.V.K. TAHILRAMANI, JJ.

DATED: JANUARY 18, 2006

ORAL JUDGMENT (Per N.V. Dabholkar, J.):

1. The appellants/accused in both these appeals were tried together, found guilty and sentenced by Addl. Sessions Judge, Palghar, District Thane, at the conclusion of Sessions Case No.17 of 1998. By the Judgment delivered on 26-4-2001, the learned Sessions Judge has held the appellants/accused guilty for the offences punishable under Sections 452, 302 r/w Section 34 of Indian Penal Code (IPC) and sentenced them to suffer RI for six months, so far as offence under Section 452 of IPC is concerned, life imprisonment and fine of Rs.1000/-, i.d. RI for three months regarding offence under Section 302 of IPC. The substantive sentences are also ordered to run concurrently. Feeling aggrieved by the finding of guilty, the Judgment of conviction and the sentences imposed, the appellants have challenged the same by these two appeals under Section 374(2) of the Code of Criminal Procedure, 1973.

2. The prosecution story can be summed up as follows:

The incident in question is said to have

occurred on 19-4-1997 at about 01:00 hours i.e. at the midnight hours between 18th and 19th April, 1997. The location of the incident is residence of deceased Besti, wife of Bachchu Dubala, at Vangaon, Taluka Dahanu, District Thane. Accused No.1 Babar is the husband of accused No.3 Besti. Accused No.2 Aalu is the brother of accused No.1. Admittedly, the houses of the deceased and the accused are opposite to each other and there is open space between the two houses. It is the claim of the prosecution witnesses that there was a dispute about this open space between the parties.

On 18-4-1997 the victim had been to the house of PW-3 Vinod, who is the brother of Bachchu (PW-1). Bachchu is the husband of deceased Besti. She departed at about 10:00 p.m. and she returned only after watching complete movie. On returning home, she latched the door from inside and sat down for her dinner. She noticed that somebody opened the door by putting hand through the door slit and opening the latch. She noticed that all three accused entered her residence. Accused No.3 Besti uttered a threat that she would kill her. The male accused persons then gripped the victim and accused No.3 poured kerosene on the person of the victim from the kerosene tin in the house of the deceased herself. Accused No.3 only is said to have ignited the victim Besti. The accused persons

thereafter departed.

PW-1 Bachchu claims that he woke up to find that his wife was ablaze. Similar is the claim of Vinod, who states that upon hearing shouts of the victim "_____", he rushed towards her house to find that the victim was on fire. None of the brothers claim to have seen either of the accused persons, either while setting the victim on fire or at least while running away.

The victim was initially taken to local hospital at Vangaon, then to Dahanu and ultimately to J.J. Hospital at Mumbai. It appears that the statement of the victim was recorded at J.J. Hospital, once by PW-5 Vinayak Pawar, who is a Special Executive Magistrate and also by PSI Vanjari, then attached to J.J. Marg Police Station (not examined by the prosecution).

The statement as recorded by PSI Vanjari when transmitted to Vangaon Police Station was treated as FIR by PW-6 Pradeep Jadhav (PSI then attached to Vangaon Police Station). On completion of the investigation, charge-sheet was filed and after committal by the Magistrate, the trial ended in conviction as described hereinabove.

3. Apart from the witnesses already referred during narration of the prosecution story, the remaining witness is PW-4 Dr. Bhalchandra Chikalkar who performed the autopsy on the dead body of Besti on 24-5-1997. He has recorded that the victim had suffered 60% superficial to deep burn injuries, which were by that time infected and the death was as a result of shock due to burns. The defence has not seriously challenged the cause of the death and therefore in the remaining part of the Judgment we are unlikely to refer to evidence of Dr. Bhalchandra.

4. On reference to the impugned Judgment, the learned trial Judge found the evidence of the brothers Bachchu and Vinod to be convincing, more particularly in the light of narration by Vinod that Bachchu had informed him of three accused persons having set the victim Besti on fire. For the reasons discussed in paragraph 13 of the impugned Judgment, after taking into consideration the observations of the Supreme Court in certain reported matters, the learned Judge found the dying declaration (Exhibit-37), as recorded by the Special Executive Magistrate, to be reliable and thus having felt that the statement of the victim recorded by the Special Executive Magistrate, as also recorded by PSI Vanjari of J.J. Marg Police Station being convincing, supported by the evidence of the husband of the deceased

and his brother, the learned Judge arrived at the conclusion that the victim was set on fire by three appellants/accused after criminal trespass into her house and in furtherance of their common intention.

5. Heard Advocate Shri Nitin V. Gangal for the appellants in both the appeals and learned A.P.P. Shri A.M. Shringarpure for the respondent-State in both the appeals. Shri Gangal has assailed both the dying declarations as narrating unconvincing and improbable story by relying upon the touch-stone of probability. According to him, the evidence of the husband and his brother also does not inspire confidence. Learned A.P.P. tried to stick to the reasonings adopted by the trial Court while praying that this Court may not interfere with the impugned Judgment.

6. Firstly, coming to the recorded dying declarations and more particularly the one at Exhibit-40, which was treated by Vangaon Police Station as the FIR, it must be said that the prosecution committed an error in not examining PSI Vanjari who had recorded the dying declaration. Dying declaration is a piece of evidence which enters the arena of admissible evidence because the maker of the statement is not available and by support of Section 32(1) of the Indian Evidence Act. By non-examination of PSI Vanjari, the prosecution has

denied itself the evidence of the person who claims to have personally heard the maker of the statement who is now not available as a witness to depose from the box. The statement produced at Exhibit-40, by relying upon the deposition of PW-6 PSI Jadhav of Vangaon Police Station, would only establish a fact that PSI Vanjari had recorded the statement of deceased Besti. The evidence of PSI Jadhav cannot establish as to what was narrated by the deceased and what was heard by PSI Vanjari. Technically the contents of this statement are, therefore, not duly proved by the prosecution.

Even otherwise, the first information report although stands on a somewhat better footing than the statement under Section 161 of Cr.P.C. (the statement can be used only for the purpose of contradicting the witness whereas FIR can also be used to support the witness), the same cannot be treated as a substantive piece of evidence and looked from this angle, it would have been obligatory on the part of the prosecution to examine PSI Vanjari, which it has not done. Consequently, the contents in the statement Exhibit-40 are not proved and we may say that this dying declaration is practically not available to support the prosecution case.

7. On perusal of the other dying declaration

Exhibit-37, in the light of the deposition by the Special Executive Magistrate, the same is full of technical flaws. This dying declaration does not bear any endorsement of the Medical Officer regarding fitness of the patient to make a statement. This is inspite of the fact that the Special Executive Magistrate Shri Vinayak Pawar asserts about the presence of the Medical Officer. According to him, because the Medical Officer did not object to the recording of the statement, he proceeded with recording of the dying declaration. No doubt after the ratio laid down by the Hon'ble Supreme Court in the matter of **Laxman v. State of Maharashtra**, reported in AIR 2002 SC 2973, either defects in the certification by Medical Officer or even absence of certification by Medical Officer may not be sufficient to disbelieve the dying declaration, provided the authority recording the same had satisfied itself about the fitness of the patient to make statement. But the Special Executive Magistrate has not obtained even the signature or thumb impression of the maker of the statement. He does not appear to have read over the statement to the maker after completion of the recording and obtained an approval of correctness of the recording. It must be said that the dying declaration at Exhibit-37 is full of technical flaws, although PW-5 Vinayak Pawar states that he has recorded as per the instructions issued. If we are to refer to the dying

declaration at Exhibit-40, same bears endorsement by the Medical Officer but only once, and that too, in the margin of the statement. The statement is so hurriedly recorded that the recording PSI probably did not find time to attest the thumb impression to be of Besti, wife of Bachchu Dubala. The yawning gap between the concluding part of the statement and the thumb impression as also attesting signature of the PSI in Exhibit-40 and similar yawning gap between the conclusion of the statement and the seal and stamp of the Special Executive Magistrate does not permit us to be free from suspicion about both the recorded dying declarations.

8. No doubt, both the dying declarations are consistent in sum and substance. Unfortunately, we are inclined to agree with the learned counsel for the appellants that even these consistent contents fail to inspire confidence when we examine them on the touch stone of probability. We may point out that the version of PW-3 Vinod to the effect that brother Bachchu informed him all three accused persons having set Besti on fire, is not supported by Bachchu. It is not the case of Bachchu that he saw and informed Vinod. Bachchu claimed to have carried out his wife to Vangaon hospital on a bicycle. Vinod claims to have accompanied them. Without drawing many adverse inferences because of such minor

discrepancies, we may examine the story, as narrated in the two dying declarations, and examine it on the touch stone of probability.

It is the claim of Besti that after the movie on Doordarshan was over, she returned home, she latched the door from inside and sat down for her dinner. It was at this juncture that the three accused entered her house by opening the door after removal of the latch by putting hand through the door slit. It is the claim of Besti that in fact on way return accused No.3 had obstructed her and challenged her about the dispute over the open space. It is the claim of Vinod that he heard shouts of the victim and therefore he rushed toward the house of his brother Bachchu. The dying declarations claim that there was verbal altercation after the arrival of the three accused persons inside the house. We feel that there are enough reasons for Bachchu to wake up before the departure of the accused. Unfortunately it is not the case of Bachchu that he woke up and saw all the three accused persons inside his house or that he saw them running away from the house. This is not a case where family members have set the bride on fire. The accused persons would have required some time to trace out the kerosene container in the house of the victim. If there was verbal altercation, there is further time lapse. In fact, alert family

member, when another had gone out would wake up to open the door. Taking into consideration all these probabilities, we feel the story, as narrated in the dying declarations, to be unnatural because it nowhere speaks about Bachchu having woken up inspite of the quarrel.

9. For the reasons discussed hereinabove, we feel that the argument of the learned counsel Shri Gangal for the appellant, that the dying declarations as also the depositions of Bachchu and Vinod are shrouded with doubt, is required to be accepted. The accused were certainly entitled to benefit of doubt, if not clean chit. We are, therefore, inclined to allow the appeals.

10. The appeals are allowed. The Judgment and Order dated 26-4-2001, delivered by Addl. Sessions Judge, Palghar in Sessions Case No.17 of 1998 thereby convicting the appellants for the offences punishable under Sections 452 and 302 of IPC is quashed and set aside and the appellants are acquitted of the charges levelled against them. They shall be set at liberty forthwith, if not required in any other case. The fine amount, if any deposited, shall be refunded to them.

The Registrar (Judl.) shall ensure early despatch of appropriate writ to the prison authorities.

(Smt. V.K.Tahilramani, J.)

(N.V.Dabholkar, J.)